JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 660 October Term, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1; TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION OF JAMES E. ALLEN, JR., TO DISMISS FOR WANT OF JURISDICTION

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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James E. Allen, Jr., as Commissioner of Education of the State of New York, appellee in the above-entitled matter, moves to dismiss the appeal herein on the ground that the Court lacks jurisdiction to hear the appeal for the reason that the appeal presents no substantial federal question.

Statement

Prior to 1965, New York Education Law, § 701 (*McKinney's Consolidated Laws*, Book 16, Part 1, § 701), authorized school authorities to purchase textbooks and either

sell or rent them to pupils attending public schools. This section was amended by Chapter 320 of the New York Laws of 1965, to provide, effective September 1, 1966, that local school boards must purchase and loan textbooks free of charge to children residing in the school district who are enrolled in grades 7 through 12 in a public or private school which complies with the State compulsory education law. Textbooks loaned to pupils in private schools are to be textbooks designated for use in any public school in the State or approved by a board of education.

As originally enacted, § 701 provided no limit upon the money required to be spent by the school districts but provided for State reimbursement up to $10 per pupil. This section was amended by New York Laws of 1966, Chapter 795, to provide that school districts are required to spend only up to a maximum of $15 per pupil for the first three years and $10 per pupil thereafter, which expenditures are to be totally reimbursed by the State to the *public* school districts. Expenditures in excess of $15 per pupil are to be included as operating expenses in the computation of State aid pursuant to New York Education Law, § 3602(5), which does not provide for 100% reimbursement.

By summons and complaint served April 29, 1966, this action was commenced seeking a declaratory judgment holding Chapter 320 of the Laws of 1965, insofar as it provides for the purchase and loan of textbooks to pupils attending sectarian schools, to be unconstitutional and in violation of Article XI, § 3 of the New York State Constitution and the First Amendment of the United States Constitution. The complaint further sought an order enjoining the Commissioner of Education from apportioning any public moneys to school districts for the purpose of purchasing textbooks for loan to pupils attending religious schools or

from removing any member of the plaintiff board of education who refused to comply with these provisions of law.

Defendant Commissioner's answer, in addition to denying the allegations of unconstitutionality of the statute, set up certain affirmative defenses which are not in issue here. By order to show cause, six parents of children, resident in the plaintiff East Greenbush district and attending sectarian schools, sought leave to intervene in the action as parties defendant. This motion to intervene was granted and all parties then moved for summary judgment. At the time of the oral argument of the cross-motions for summary judgment, plaintiff Union Free School District (Roslyn District) sought leave to join in the action as a party plaintiff, which motion was also granted.

New York Supreme Court, Albany County, held Education Law, § 701, to be unconstitutional under both Article XI, § 3, of the New York Constitution and the First Amendment of the United States Constitution, insofar as the statute provides for the loan of textbooks to pupils attending sectarian schools, and granted plaintiffs' motion for summary judgment (51 Misc. 2d 297, 273 N. Y. S. 2d 239). The statute was held unconstitutional under a provision of the New York State Constitution, based on two New York State Court decisions (*Smith* v. *Donahue*, 202 App. Div. 656, 195 N. Y. Supp. 715 [3rd Dept., 1922]; and *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576 [1938]).

As to the invalidity of the statute under the First Amendment, the Court relied primarily upon *Engel* v. *Vitale*, 370 U. S. 421, and *School District of Abington TP., Pa.* v. *Schempp*, 374 U. S. 203.

The Appellate Division of the Supreme Court, Third Judicial Department, reversed the Trial Court's decision

(27 A. D. 2d 69, 276 N. Y. S. 2d 234). However, the majority opinion in that Court was based on a finding of lack of standing on the part of plaintiffs to raise the issue of constitutionality. The remaining Justices concurred in the result, but on the ground that, although they would have held that the districts had standing, they were of the opinion that the statute was in fact constitutional. Indeed, the majority itself stated in *dictum* that they were also of the opinion that the statute was constitutional and would have so held had they reached the merits.

Plaintiffs then appealed to the New York Court of Appeals. Four judges held that plaintiffs had standing to bring the action[1], four judges also held that the statute was constitutional[2], but only one judge was a part of both majorities[3] (20 N. Y. 2d 109; 281 N. Y. S. 2d 799, 228 N. E. 2d 791).

The Court of Appeals decision was based on a finding that the provision of secular textbooks to all children regardless of their religious affiliation did not constitute an aid to religion. In so holding, the Court's opinion states (20 N. Y. 2d, p. 116):

> "The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1, *supra*), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at

[1] Chief Judge FULD and Judges VAN VOORHIS, KEATING and BREITEL.

[2] Judges BURKE, SCILEPPI, BERGAN and KEATING.

[3] Judge KEATING.

improving the quality of education in all schools is a matter of legitimate State concern.

"Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly."

Citing *Everson* v. *Board of Education* (330 U. S. 1), the Court of Appeals held that the loaning of secular textbooks to all students also does not violate the First Amendment in that such a practice neither establishes a religion nor constitutes the use of public funds to aid religious schools.

ARGUMENT

The appeal fails to raise a substantial federal constitutional question.

The appellants here contend that the provision of textbooks equally to all school children constitutes a prohibited aid to religion because some of those children attend sectarian schools. Appellee submits that this argument presents no substantial federal constitutional question because the legal issue has already been decided by this Court.

The decisions of this Court have never invalidated public benefit programs which have as an incidental or collateral effect resulted in some aid to a religious institution. In the *Everson* case, *supra*, the majority opinion clearly found non-discriminatory programs directed to a non-denominational public purpose to be valid, a holding found particularly in such declarations in the opinion as the following:

"While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the

citizens of New Jersey against state-established churches, to be sure that we do not indirectly prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief" (330 U. S., p. 16).

"That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them" (330 U. S., p. 18).

Even more recently this Court held valid the Sunday closing statutes of several states on the ground that they were directed to promote the appropriate secular objective of having a single day of rest during the week (*McGowan* v. *Maryland*, 366 U. S. 420 [1961]; *Two Guys From Harrison —Allentown, Inc.* v. *McGinley*, 366 U. S. 582 [1961]; *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U. S. 619 [1961]; *Braunfeld* v. *Brown*, 366 U. S. 599 [1961]). Thus, if government directs its purposes to an appropriate secular end, as opposed to a governmental program designed to aid or promote religious activity as such, this Court has already held such a program to be valid and constitutional and no new constitutional issue is raised for consideration here solely because the factual issue involves textbooks, rather than school busing or a single day of rest.

The end to be achieved by the provision of textbooks was clearly equality of educational opportunity for all students. The legislative policy statement set forth in Chapter 320 demonstrates the significance of this welfare concept in the legislative enactment:

"The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of

> those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state."

The national, as well as State, welfare interest in the education of all children, expressed in the policy statement of Chapter 320 finds an echo in the concern of President Johnson in his Education Program Message of January 12, 1965, wherein he noted:

> " 'The explosion of knowledge and the rapid revision of curriculums in the schools has created new demands for textbooks. The obsolete text can suffocate the learning process. Yet the cost of purchasing textbooks at increasing prices puts a major obstacle in the hands of education—an obstacle that can and must be eliminated' " (111 Cong. Rec. 499, 500).

The secular purpose in the provision of textbooks to all students is thus readily apparent. The aid to sectarian religion, alleged by appellants, cannot be so found.

It is an uncontested fact in this case that the pupils resident in the appellant districts, who attended sectarian schools before Chapter 320 was enacted, were required to purchase their own texts. The schools did not provide them. Under Chapter 320, textbooks are loaned to individual students, no matter what the auspices of the school in which they are enrolled. The textbooks loaned are those approved for use in public schools and the loan to the pupil, who would otherwise have to purchase his own books, can

in no way be said to be an aid to denominational schools, either directly or indirectly.

That the provision of textbooks to all pupils equally is not an aid to their schools has also already been determined by this Court (*Cochran* v. *Board of Education*, 281 U. S. 370 [1930]), although as a question under the Fourteenth Amendment rather than the First. At the time of that decision, the provisions of the First Amendment had not yet been extended to cover State action; consequently, the issue in the *Cochran* case was whether the provision of textbooks to pupils who attended sectarian schools was a taking of private property for a private purpose in violation of the due process clause of the Fourteenth Amendment. This Court rejected the argument of appellants there in an opinion by Chief Justice HUGHES, quoting a portion of the opinion of the Louisiana Supreme Court (281 U. S. at pp. 374-375):

> " 'The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children of the state alone are beneficiaries.' "

Here, too, the schools gain nothing, are relieved of no obligations, and all the children of the State are the only beneficiaries.

A further test of the constitutional validity of legislative enactments was put forth in the recent *Schempp* case (*School District of Abington TP., Pa.* v. *Schempp*, 374

U. S. 203 [1962]), in which Mr. Justice CLARK, writing for the Court, stated (p. 222):

> "The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

In this case the purpose and primary effect of the legislation is to provide secular textbooks equally to all children regardless of their school affiliation. Religion is in no way aided, except in a possibly remote or collateral manner. Chapter 320, consequently, raises no issue under that test.

In view of the recent decisions of this Court, the issue presented by appellants on this appeal raises no substantial federal constitutional question warranting review by this Court.

CONCLUSION

The appeal herein should be dismissed for lack of jurisdiction to hear the appeal, on the ground that no substantial federal question is presented.

Dated: October 20, 1967.

Respectfully submitted,

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